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In The
Supreme Court of the United States
October Term, 1983

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,
Cross-Respondents.

REPLY BRIEF FOR THE CROSS-PETITIONERS

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ARGUMENT

I. THE ISSUE OF THE PROPER CONSTRUCTION OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE," IS NOT RIPE FOR ADJUDICATION.

In their responses to the cross-petition, the Department of the Interior (DOI) and the Western Oil and Gas Association (WOGA) attempt to embroil this Court in a controversy that has never arisen over the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U. S. C. § 1456(c)(1). Indeed, the unripeness of the Ninth Circuit's discussion of this point is highlighted by the cross-respondents' briefs.

As we explained in some detail in our opening brief, the standard "to the maximum extent practicable" in § 307(c)(1) can be meaningfully construed only in the context of a ripe controversy—that is, after the elaborate con-

sistency process triggered by the "directly affecting" threshold test has been exhausted, and the federal-state coordination envisioned by the CZMA has proved unavailing. First, the federal agency must examine the policies of the state's coastal zone management program and apply them to the activity at issue in light of the anticipated coastal zone impacts. As a result of this analysis, the federal agency must issue a "consistency determination." 15 C. F. R. § 930.39. Both before and after the issuance of the consistency determination, an extensive process of federal-state consultation and coordination is required in order to determine if intergovernmental agreement can be reached concerning whether the activity is consistent, or can be made consistent, "to the maximum extent practicable" with the coastal zone management program. *See* 15 C. F. R. §§ 930.34, 930.39, 930.42, 930.43, 930.111-.112. It is only when and if this administrative process has been exhausted without resolution, if the federal agency proceeds with the activity in spite of state objections, and if the state then decides to sue, that there can be any ripe dispute over the legal standard for federal compliance with the coastal zone management program, *i. e.*, consistency "to the maximum extent practicable."

Although none of the foregoing events has occurred, WOGA seeks to have this Court render an advisory opinion on such questions as what would be the appropriate standard of review of a consistency determination once made,[1] and whether DOI need only act in "good faith" in

[1]The cross-respondents attempt to obscure the significance of the "maximum extent practicable" requirement of § 307(c)(1) by focusing on the question of the standard of review for secretarial decisions concerning consistency under the Administrative Procedure Act, 5 U. S. C. §§ 701 *et seq.* (APA). WOGA C.R. Br. at 18-20; *see also* DOI C.R. Br. at 14 n. 9. WOGA seiz-

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fulfilling the consistency mandate of the CZMA in some hypothetical future case. WOGA Brief of Cross-Respondents (C. R. Br.) at 18-19, 32.[2] Cross-petitioners submit that all such questions, which necessarily invoke the meaning and application of the "maximum extent practicable" standard, should await a case where a consistency deter-

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es upon the "arbitrary or capricious" standard from § 706 of the APA as if this were the only standard a court could possibly look to in measuring the Secretary of the Interior's compliance with § 307(c)(1). *Id.* Putting aside the question of whether this is indeed the applicable standard of review, it is apparent that WOGA's argument ignores another requirement of § 706 of the APA, that federal actions must be "in accordance with law." In short, WOGA obfuscates the substantive requirement of § 307(c)(1) that federal activities must be consistent "to the maximum extent practicable" with the federally approved management program, a body of substantive law, in its portrayal of review of a secretarial consistency determination as a purely procedural matter. *See* 15 C.F.R. § 930.32(a) ("[S]ections 307 (c)(1) and (2) and 307(e) require federal agencies . . . to consider State management programs as supplemental requirements to be adhered to in addition to existing agency mandates.").

[2]Similarly, in the trial court, WOGA sought to draw the court into ruling on the effect of the policies of the California Coastal Management Program. California argued that the question of whether Lease Sale 53 was *in fact* consistent with the program would not be ripe for review until DOI had conducted a consistency determination and the policies of the program had actually been applied. *See* C.R. 94, California Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment at 46-49; *see also American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 903 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979). The District Court declined to rule prematurely on the hypothetical effect of the coastal protection policies.

The federal cross-respondents do not take precisely the same tack as WOGA, no doubt because they wish to preserve for themselves the ability actually to issue a "consistency determination" before having the courts rule on the efficacy of such a significant federal decision.

mination has actually been prepared, and the controversy is ripe.[3]

A. Contrary To WOGA's Assertions, The State Of California Did Not Seek Any Relief Below That Would Require This Court To Construe The "Maximum Extent Practicable" Standard.

As part of their attempt to entangle this Court in an unripe dispute, cross-respondents seek to convey the erroneous impression that California sought in the lower courts to obtain a ruling that, through the CZMA, the state usurps the federal government's supreme authority over the OCS, and that the lower courts should require the lease sale to be absolutely consistent with the state's construction of its coastal zone management program.[4] WOGA

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[3]The inappropriateness of adjudicating the issue now is plainly demonstrated by the fact that if a suit were filed that solely requested a determination of the meaning of the phrase "to the maximum extent practicable," in advance of completion of the consistency process and the creation of an actual controversy, the court would doubtless reject the litigation as a request for an advisory opinion. The fact that an independent issue, the applicability of the consistency requirement to outer continental shelf (OCS) leasing, is disputed in this suit does not render the question of the meaning of the "maximum extent practicable" standard any more ripe, prior to its actual application.

[4]As California's complaint makes crystal-clear, California sought to have the District Court declare that Lease Sale 53 "directly affected" the coastal zone and thus required a consistency determination under § 307(c)(1). *See, e. g.*, Cal. complaint, J.A. 25 ¶ 49, 26 ¶ 55, 27 ¶ 59, 33 ¶ 2. We also requested that the court retain jurisdiction so that the judge familiar with the case could oversee compliance with consistency procedures. Cal. complaint, J.A. 26 ¶ 56.

There is nothing either in the complaint or in briefs below which indicates California sought a declaration of state supremacy on the OCS. To the contrary, California's Ninth Circuit Brief asserts that application of § 307(c)(1) to leasing "does not give states a veto power over OCS decisions." California Ninth Cir. Br. at 53. The same position has been taken in this Court. *See* Cal. Resp. Br. at 41-47.

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Br. at 5-7, DOI Br. at 3-4, 10-11. However, WOGA's claim that the state urged below its supremacy on the OCS is clearly belied by the record.[5] Cross-petitioners have never asserted that the states have any proprietary interest in the OCS or that they may override the will of Congress in determining the proper means of its management.[6] Cal.

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WOGA also argues that the relief ordered by the District Court was "premised on California's ultimate authority to regulate OCS leasing." WOGA C.R. Br. at 6. WOGA bases this argument on the fact that in addition to ordering a consistency determination, the trial court states that all activities on the tracts at issue should be conducted consistently with California's program. *Id.* However, the only flaw in the District Court's statement was the failure to add the statutory qualification "to the maximum extent practicable." Since this qualification has now been inserted by the Ninth Circuit, there are no issues remaining in the case concerning relief. In any event, neither California nor the District Court ever suggested that the state had "ultimate authority to regulate OCS leasing."

[5]WOGA disingenuously quotes, out of context, California's discussion about the state having a "final responsibility for management," as if this reference were to management of the OCS. WOGA C.R. Br. at 8. However, the state has used this phrase throughout this litigation as a reference to its authority over the *coastal zone* (out to the three mile limit), not to state authority on the federal OCS. *See* DOI Pet. at 42a; 16 U. S. C. § 1453(1).

[6]Cross-respondents also assert that California failed to notify the federal government that OCS leasing was an activity likely directly to affect the coastal zone. WOGA C.R. Br. at 34. However, as DOI explicitly observes in its brief, the dispute between California and DOI has been of longstanding duration, dating back to 1977. DOI C.R. Br. at 7. (California's Coastal Zone Management Program was approved in 1977. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 893-4 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979).) DOI's longstanding knowledge of California's position is reflected not only in its recent brief, but also in its 1977 comments during the federal process approving California's program. *See* U. S. Department of Commerce Combined State of California Coastal Management Program and Final Environmental Impact Statement, C.R. 3, Cal. Exh. L-18, Attachment J at 20.

WOGA also criticizes the State for failing specifically to list in its program DOI's OCS leasing as an activity likely directly to

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Resp. Br. at 41-47, Local Gov't Resp. Br. at 17-22, NRDC Resp. Br. at 3-18. The very question in this case is the nature of the congressional intent in enacting the CZMA.

B. The Meaning Of The Phrase "To The Maximum Extent Practicable," As Used In § 307(c) (1) Of The CZMA, Is Not Presently Fit For Judicial Review.

Both DOI and WOGA attempt to portray the identification of the parameters of the phrase "to the maximum extent practicable," as it appears in § 307(c) (1) of the CZMA, as a purely legal question. DOI C.R. Br. at 17; WOGA C.R. Br. at 10. Based on this portrayal, they maintain that the issue is currently fit for judicial review. But it is ludicrous to assert that this general phrase has a sufficiently uniform meaning apart from any specific fact situation that its application to a given category of federal activity—here, DOI's offshore oil lease sales—becomes a "legal issue."

Nonetheless, the cross-respondents improperly seek a specific construction of the practicability standard for DOI's lease sales in the absence of a full administrative record upon which to make such a construction and contrary to sound general guidance on the meaning of the phrase in the regulations of the National Oceanic and Atmospheric Administration (NOAA) implementing the con-

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affect the coastal zone. WOGA C.R. Br. at 34. NOAA's regulations on this question which were not adopted until after California's program was approved, 43 Fed. Reg. 8415, 10517, 10520 (1978), make clear that the listing of federal activities outside the coastal zone is optional, and that, in any event, the failure to list a federal activity does not excuse the federal agency from preparing a consistency determination. *See* 15 C. F. R. § 930.35 and comments thereto, 44 Fed. Reg. 37147 (1979). The important thing is that the state notify the federal agency that the particular activity at issue (in this case, Lease Sale 53) directly affects the coastal zone, and there is no dispute that this was done in this case. *See* 15 C. F. R. § 930.35(b).

sistency requirements of the CZMA.[7] 15 C. F. R. Part 930. DOI has chosen to ignore NOAA's regulations, seeking instead to have the courts create for it a new scheme of CZMA compliance. It is anomalous for DOI, while refusing to follow NOAA's consistency procedures, simultaneously to urge that, if its activity is found directly to affect the California coastal zone, the time is ripe for the courts to supercede the guidance on consistency compliance that NOAA has provided at Congress' behest.[8]

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[7]While both cross-respondents seem to acknowledge that NOAA's definition of "to the maximum extent practicable" is valid, neither gives more than lip service to that definition, taking instead positions contrary to it. DOI C.R. Br. at 19; WOGA C.R. Br. at 28-29. Both endorse the Ninth Circuit's suggestions as to the meaning of the phrase, which directly contradict the NOAA definition. For example, while the NOAA definition defines "consistent to the maximum extent practicable" as requiring federal activities "to be fully consistent with [state management] programs unless compliance is prohibited" by requirements of other federal laws, 15 C. F. R. § 930.32(a), the Ninth Circuit opined that

> The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*.

DOI Pet. at 19a (emphasis in original).

And despite the creative efforts of the cross-respondents to convince this Court that the Court of Appeals had considered the NOAA definition when it wrote Part E of its opinion, DOI C.R. Br. at 18-19; WOGA C.R. Br. at 27-28, a reading of Part E reveals not a single reference, either direct or oblique, to that definition, let alone the careful consideration it deserved as the interpretation of the federal agency charged with implementing the CZMA. A court addressing the requirement of consistency "to the maximum extent practicable" at the proper time would not make this mistake, for the application of NOAA's definition to DOI's proposed lease sale would be plainly documented in the administrative record created during the consistency process.

[8]The Court should not be misled by cross-respondents' protestations that all that the Ninth Circuit discussed was a standard for consistency for OCS lease sales, not the consistency of

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Moreover, as cross-petitioners made clear in our opening brief, it is perilous to render advisory general pronouncements about the requirements of a provision governing all federal agencies' activities directly affecting the coastal zone by reference only to the laws relating to a single federal activity, DOI's offshore leasing program. *See* Brief for the Cross-Petitioners (C.P. Br.) at 26-27. Indeed, as the "maximum extent practicable" standard also appears in § 307(c) (2), which governs the consistency of federal developments *in* the coastal zone, proper interpretation of this provision is also jeopardized by a definition of the phrase that looks solely to DOI's OCS leasing.

Cross-respondents also assert that an administrative record already exists that provides the record necessary to the current resolution of the consistency standards to be applied to Lease Sale 53—the environmental impact statement and other documents prepared pursuant to the National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA). DOI C.R. Br. at 12-13; WOGA C.R. Br. at 10 n. 5. However, the record that exists is not the record that would be compiled if the Secretary complied with the requirements of the CZMA. The documents presently in the record simply do not address with any particularity California's coastal program or the requirements of the CZMA as these relate

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Lease Sale 53 itself with California's coastal program. DOI C.R. Br. at 14-15; WOGA C.R. Br. at 10. By so arguing, they seek to create the impression that the latter alone is unripe for determination at this time. However, the formulation of consistency standards for a particular federal activity is inextricably linked to the details of that activity, and of the state's coastal program. Such standards logically should not be addressed outside the NOAA process that would bring those details fully to light.

to Lease Sale 53; much less do they reflect DOI's application of the program to the lease sale. For this reason, these documents do not provide the proper factual background for the application of the practicability standard to an OCS lease sale.[9]

Nor are cross-respondents' attempts to distinguish *Industrial Union Department v. Marshall*, 448 U.S. 607 (1980), at all persuasive. That case stands firmly for the proposition that the construction of statutory duties consequent upon the meeting of a statutory threshold is not properly addressed until that threshold has been passed. Here, as in *Industrial Union*, the federal agency has not performed its threshold statutory duty: DOI has refused to acknowledge that Lease Sale 53 directly affects California's coastal zone and to conduct a consistency determination thereon.[10] In sum, the issue of the degree to

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[9]The invaluable information for judicial review that would result from allowing the state-federal consistency process to run its course is discussed more fully in Part D, *infra*. *See also* C.P. Br. at 17-18.

[10]Nonetheless, DOI argues that, in *Industrial Union*, the case was remanded with "standards and considerations the Secretary should weigh in making that eventual determination." DOI C.R. Br. at 16. However, the "determination" referred to is the *threshold* determination properly addressed by the Court. We agree with this Court's reasoning in *Industrial Union* that complex issues of law and fact that are contingent upon having met such a threshold are better left until the threshold is passed and an actual controversy arises based upon a fully developed administrative record.

WOGA makes an additional attempt to distinguish *Industrial Union*. WOGA C.R. Br. at 12. It argues as a critical distinction that the requirement of the Occupational Safety and Health Act that the Court held unripe was in a different section of the Act than the threshold requirement that the Court addressed, whereas here both requirements are in the same section of the CZMA. This distinction is, of course, irrelevant. The deciding factor in *Industrial Union* was the sequential nature of the duties, not their points of appearance in the statute. 448 U. S. at 615. Concerning this factor, there is no distinction between *Industrial Union* and the instant case.

which an OCS lease sale must be consistent with a state coastal management program in order to be consistent "to the maximum extent practicable" is not currently fit for judicial resolution.

C. The "Hardship" Of Which DOI Complains Could Not Be Relieved By A General Advisory Opinion On The Meaning Of "To The Maximum Extent Practicable."

DOI points to the injunction currently in effect as the basis of the hardship it claims justifies premature interpretation of the phrase "to the maximum extent practicable."[11] DOI C.R. Br. at 17. However, that injunction is not at all dependent upon an interpretation of that phrase, but rather on DOI's failure to acknowledge that its proposed lease sale meets the "directly affecting" requirements of § 307(c)(1), and to follow NOAA's consistency determination process. Were DOI to do so, a dispute over consistency "to the maximum extent practicable" might never arise, since any disagreement might well be resolved in that process. *See* Part D, *infra*.

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[11]Both DOI and WOGA identify as an element of the hardship they claim to suffer the frustration of what they purport to be the exclusive goal of the OCSLA—the expeditious exploitation of the petroleum resources of the OCS. DOI C.R. Br. at 17 n. 11; WOGA C.R. Br. at 11. However, the OCSLA recognizes and respects other values as well as oil exploitation and certainly does not mandate the development of oil resources in contravention of other federal statutory requirements. *See* Cal. Resp. Br. at 41 n. 70; NRDC Resp. Br. at 13-14; Local Gov't Resp. Br. at 41-43. Somewhat ironically, given its hardship argument, WOGA elsewhere fully acknowledges the OCSLA's concern for other values. WOGA Pet. Reply Br. at 13.

Further, the preparation of consistency determinations by DOI has in fact resulted in productive compromises between DOI and the states in a number of instances, see n. 12, *infra*, and in very little of the litigation that WOGA claims will stem from these determinations. Thus, the application of § 307(c)(1) to OCS leasing does not appear to be frustrating oil development on the OCS to any significant extent.

The hardship that DOI and WOGA claim supports the premature adjudication they seek is the possibility of future delay of Lease Sale 53 that might arise if DOI fails to conduct the sale consistently, "to the maximum extent practicable," with California's coastal management program. But the cross-respondents make no showing whatsoever that this potential hardship would be alleviated by a ruling now on the general contours of the phrase "to the maximum extent practicable." They cannot, for no abstract advisory opinion on the application of that standard to OCS lease sales would resolve the ultimate issue of whether Lease Sale 53 is properly consistent with California's program and thereby prevent the delays the cross-respondents fear. Indeed, they acknowledge as much in noting that this issue is not currently ripe for resolution. DOI C.R. Br. at 14-15; WOGA C.R. Br. at 10. This being the case, the cross-respondents have simply not demonstrated any hardship from which an advisory ruling now on the general application of the practicability standard to OCS oil leasing would save them.

D. Other Avenues To Resolve A Hypothetical Consistency Dispute Are Available To DOI And Must Be Exhausted Before The Issue Of Consistency "To The Maximum Extent Practicable" Is Properly Subject To Judicial Review.

DOI and WOGA both strongly resist the notion that any consistency dispute that might emerge from DOI's preparation of a consistency determination pursuant to NOAA's regulations could be resolved in the course of the process for handling such disputes that those regulations provide. DOI calls the prospect of agreement on consistency "remote at best." DOI C.R. Br. at 17. WOGA refers to as "highly speculative" the possibility of dispute

resolution at any of several steps in the process specifically designed for that purpose.[12] WOGA C.R. Br. at 13. In so arguing, cross-respondents once again evince their misunderstanding of the basic purpose of the consistency process, which was expressly created to encourage states and federal agencies to work out their differences without resort to litigation. *See, e. g.*, 15 C. F. R. §§ 930.38-.44.

In their insistence that resort to the NOAA process will be of no avail, they also disagree with the Ninth Cir-

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[12]Both DOI and WOGA argue that this Court should resolve the question of the meaning of "to the maximum extent practicable" because NOAA's consultative, cooperative process is sure to fail. However, this argument is belied by the fact that, since the opinion of the Ninth Circuit issued, DOI has begun preparing consistency determinations around the country, and the ensuing consultation process has in fact produced agreements with other states which have resolved the concerns arising from state coastal management programs. *See* Cal. Resp. Br. at 5. For example, in May 1983, DOI entered into a Memorandum of Understanding (MOU) with the State of Florida that extensively modified the South Atlantic Lease Offering of July 1983 in order to protect the coastal zone. This MOU provided for the deletion of certain tracts from the sale, for DOI funding of detailed physical oceanographic study of deep water tracts, and for postponement of exploration on hundreds of deep water tracts until twelve months of data from the physical oceanographic study had been collected and analyzed. The MOU also provided for the imposition of additional biological stipulations on all deep water tracts leased in the sale. These stipulations required a determination prior to exploratory drilling of the existence of biological habitats that required special protection.

DOI has also entered into memoranda of understanding with the Governor of Alaska regarding Lease Sale 57 (Norton Basin) and Lease Sale 70 (St. George Basin) that expressly addressed accommodation to Alaska's coastal zone management program. Moreover, in the majority of cases where DOI has issued consistency determinations, the states have concurred in DOI's finding that the sales are consistent with their coastal programs. Thus, it is clear that, when DOI is willing to enter into the federal-state coordination process contemplated by Congress, concrete results can be achieved.

cuit, which expressed its opinion that, absent a consistency determination,

> [I]t is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation.

DOI Pet. at 23a. The Court of Appeals goes on specifically to encourage mediation by the Secretary of Commerce as a possible avenue of dispute resolution. *Id.* DOI and WOGA both seem to reject mediation out of hand. DOI C.R. Br. at 13 n. 8; WOGA C.R. Br. at 14 n. 9.[13]

At the same time, they assert that the NOAA process is unworkable because California has irrevocably made up its mind that leasing the contested tracts of Lease Sale 53 would be inconsistent with its coastal management program. DOI C.R. Br. at 17 n. 12; WOGA C.R. Br. at 14. However, DOI has steadfastly refused to provide California with a determination as to whether and how the lease sale is or is not consistent with California's program.[14] Accordingly, the California Coastal Commission

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[13]WOGA points to the unsuccessful attempt at mediation in Lease Sale 48 to bolster the proposition that there is "little reason to believe mediation would be successful here." WOGA C.R. Br. at 14 n. 9. However, as WOGA acknowledges, that mediation involved only the issue of whether a lease sale directly affects the coastal zone within the meaning of § 307(c)(1). It did not involve any issue of the extent to which Lease Sale 48 was consistent, "to the maximum extent practicable," with California's coastal program. This being the case, the results of that mediation have little predictive value for the success of mediation in a case in which the degree of consistency is in dispute.

[14]In the ordinary situation under § 307(c)(1), the federal agency would consult with the state to obtain its views, 15 C. F. R.

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had little choice but to make a preliminary assessment of consistency and tentatively determined that the leasing of the disputed tracts would be inconsistent with California's program. However, had DOI participated in the exchange and compromise intended to occur in the NOAA process, it is by no means certain that the parties would not have altered their positions. *See* n. 12, *supra*. We simply do not know what resolution might result were this process undergone.

Even if the cross-respondents' prophecies of a failure to resolve a consistency dispute during the NOAA process proved accurate (for reasons of self-fulfillment or otherwise), the process would have created a detailed administrative record. Not only would the record pinpoint those aspects of the proposed lease sale arguably inconsistent with California's coastal program and the specific provisions of the program involved, but it would also set forth the alternative means of achieving consistency that had been considered, such as specific lease stipulations or deletion of certain tracts, and explain why these were not practicable. In sum, the record would provide the specific factual setting essential to a full and final resolution of

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§ 930.37(a), comment to § 930.39, 44 Fed. Reg. 37148 (1979), and would then issue a consistency determination, to which the state would have an opportunity to respond. 15 C. F. R. § 930.41. However, since that process did not occur, the California Coastal Commission was forced to make its own assessment of whether it had substantive concerns over the leasing of the tracts at issue here. As a result of that assessment, the Commission determined that it had no objection to having the sale proceed as to the majority of the tracts (82 out of 111) in the sale, but that its substantive consistency concerns as to 29 of the tracts were sufficiently serious to require litigation over DOI's refusal to prepare a consistency determination. J.A. 120. (The Coastal Commission's staff report requests deletion of 31 tracts, but these were consolidated by DOI into 29 tracts. DOI Pet. at 45a.)

the issue of the degree of consistency required to meet the "maximum extent practicable" standard.

II. EVEN IF THE ISSUE OF THE MEANING OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE" WERE RIPE FOR DECISION, CROSS-RESPONDENTS' SUGGESTED INTERPRETATIONS ARE PLAINLY INCORRECT.

While cross-petitioners submit that the meaning of the phrase "to the maximum extent practicable" in § 307 (c) (1) of the CZMA is not an issue presently ripe for adjudication, assuming *arguendo* that it is, we wish to address two patently erroneous suggestions advanced by the cross-petitioners concerning its interpretation.

First, WOGA contends that all that DOI need do in determining that a lease sale is consistent "to the maximum extent practicable" with California's coastal management program is base that determination on a "good-faith interpretation" of the "vague" provisions of the program.[15] WOGA C.R. Br. at 32. According to WOGA, no

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[15]That WOGA's contentions regarding the "vagueness" of the California program are unsupportable is made abundantly clear by *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979). In that case, California's coastal management program was attacked for being insufficiently specific to enable a project's proponent "to say with certainty that a given project must be deemed 'consistent' therewith." 456 F. Supp. at 919. The court rejected this notion, making clear that coastal programs are to provide performance standards and that the state coastal authority must play a central role in applying these to specific situations. *Id.* It is fruitless for WOGA to argue that DOI need only look to the program's general provisions and not consider the Coastal Commission's construction of its program in determining whether its activities are consistent "to the maximum extent practicable" therewith, given that the very form of the program intended by Congress and approved by the courts necessitates "interaction between the relevant state agencies and the user," here, the California Coastal Commission and DOI. *Id.*

attention is due the Coastal Commission's construction of the provisions of its plan. *Id.*

While WOGA couches the final section of its argument as support for the correctness of the Court of Appeals' examination of this issue, the conclusions it advances on the requirement of consistency "to the maximum extent practicable" are nowhere to be found in that opinion. WOGA C.R. Br. at 25-35. Nor could any court uphold the proposition advanced by WOGA, *i. e.*, that DOI need not act consistently with the provisions of California's program as required by § 307(c) (1), but merely need make a good-faith attempt to do so. A federal agency's compliance with congressional mandates is more than a matter of "good-faith interpretation."

Further, it cannot be logically argued that it is the federal agency that independently interprets the provisions of the state's program under § 307(c) (1) and (c) (2), without considering the state coastal agency's construction. Congress certainly did not intend in enacting the CZMA that federally-approved state management programs would become an amalgam of independent, potentially conflicting interpretations of their basic provisions by each federal agency whose activities triggered § 307(c) (1) or (c) (2).[16] This would ironically alter that section,

[16]Given that every federal agency whose activities directly affect the coastal zone must comply with § 307(c) (1) (and those proposing development in the coastal zone must comply with the identical requirements of (c) (2)), construction of the state's program by each federal agency without reference to the state's interpretation would lead to dozens of separate and unreconciled constructions of the program's requirements. Further confusion would result when the state coastal agency then interpreted the program in applying it to federal permittees under § 307(c) (3). Moreover, a comment to NOAA's regulations makes clear that the federal agency should consult the

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rightly known as the consistency provision, into one actively fostering myriad inconsistencies. Only if the state coastal agency, as the congressionally-designated agency with the greatest expertise in the implementation of the state's coastal management program, is afforded some degree of deference in its construction of that program—and only if the process of intergovernmental cooperation established by NOAA is followed in applying the provisions of that program to a proposed federal activity—can the program be applied with any uniformity.

WOGA also goes well beyond the Ninth Circuit decision in its discussion of the effect of consistency review at post-lease sale stages. WOGA C.R. Br. at 21-25. The Ninth Circuit merely stated that in determining consistency at the lease sale stage, DOI can take into account that additional consistency determinations are made at the subsequent stages. DOI Pet. at 22a.[17] WOGA attempts

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state coastal agency's construction of its program in making its consistency determination under § 307(c) (1):

> As a preliminary matter, Federal agencies are strongly encouraged to obtain the views and assistance of the State agency regarding the provisions of the management program which are related to the proposed activity and the information necessary to determine whether the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the management program.

Comment to 15 C.F.R. § 930.39, "Content of a consistency determination," 44 Fed. Reg. 37148 (1979).

[17]Cross-petitioners have never suggested that consistency requirements at subsequent stages should be ignored. To the contrary, as the regulations implementing § 307(c) (1) clearly indicate, the consistency review is conducted "in phases based upon developing information, with each subsequent phase subject to Federal agency discretion. . . ." 15 C.F.R. § 930.37(c). Rather, our contention is that consistency review must be ap-

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to transform these remarks of the Court of Appeals into a repudiation of its holding that an OCS lease sale "directly affects" the coastal zone, and that a consistency determination must be done at the lease sale stage.

We have already responded to these arguments at length. Cal. Resp. Br. at 36-41, Local Gov't Resp. Br. at 28-43; NRDC Resp. Br. at 45-50. WOGA's argument is nothing more than a transparent attempt improperly to reargue the "directly affecting" issue in its cross-respondents' brief on "maximum extent practicable."[18]

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plied at the lease sale stage *and* at subsequent stages, particularly because some issues (*i. e.*, tract deletions and lease stipulations) can only be addressed at the lease sale stage. *See* n. 12, *supra*.

[18]In so doing, WOGA seeks once again to denigrate the significance of the lease sale stage, citing cases decided under other statutes such as NEPA and the Endangered Species Act. WOGA Br. at 22-25. Cross-petitioners have previously distinguished these cases and statutes. *See, e. g.*, Cal. Resp. Br. at 41 n. 69; NRDC Resp. Br. at 49. However, noticeably absent from WOGA's discussion of authorities is a recent OCS decision of the First Circuit Court of Appeals, *Commonwealth of Massachusetts v. Watt*, — F. 2d — (September 16, 1983 Slip Opinion, Nos. 83-1258, 83-1265). Although the issue decided by the appellate court arose under NEPA, the court stressed the significance of the lease sale stage in determining that a preliminary injunction was necessary to remedy an inadequate EIS. *Id.* at 14-20.

The court observed that had the Secretary been fully informed about the environmental effects of the sale, he might have *deleted* additional tracts at the lease sale stage. *Id.* at 6. The same result could be expected if the Secretary were fully informed at the lease sale stage of any inconsistency with the federally approved coastal zone management program. Indeed, this is exactly what has happened in other states. *See* n. 12, *supra*.

CONCLUSION

For the foregoing reasons, cross-petitioners respectfully urge this Court to hold that the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act, as discussed in Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit, DOI Pet. at 19a-23a, was and is unripe for determination in this case.

Respectfully submitted,

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